ment. It is in the interest of the infants that the applicant should have the custody so that they could return to live with their natural sister and brother. The respondent is entitled to have reasonable access. I make no order as to costs.

Application granted.

FOOK LEE BROS. v. CONSERVATOR OF FORESTS

[O.C.J. (Lee Hun Hoe J.) December 23, 1969]

[Kota Kinabalu — Civil Suit No. 169 of 1969]

Government Proceedings — Proceedings against Government of a State must be instituted against the government — Writ of summons not to be served upon government but only a notice in lieu of writ — Service on State Attorney-General — R.S.C. 1957, O.1A r.1(3) — Government Proceedings Ordinance, 1956, ss. 22 & 26.

Practice and Procedure — Government proceedings — Service of writ of summons — Irregularity — Application to set aside — Government Proceedings Ordinance, 1956 — Whether letters after service amounts to "fresh step" — R.S.C. 1957, O.72 r.2.

In this case the plaintiffs had taken out a writ of summons against the Conservator of Forests to recover the sum of $6,588 which they claimed to have paid as royalty under a mistake of law or fact. The defendant applied by motion to have the writ of summons and service of the writ set aside on the ground of irregularity.

Held: (1) as the proceedings were against the Government of a State it should have been instituted against the government;

(2) in an action against the government no writ of summons shall be served but only a notice thereof;

(3) service should have been effected on the State Attorney-General instead of the Conservator of Forests;

(4) the defendant in this case by writing two letters after the service of the writ had not taken any "fresh step" in the motion so as to preclude him from making the application to have the writ of summons and service thereof set aside.

Cases referred to:-

(1) *Wood* v. *Middleton* [1897] 1 Ch. 151.

(2) *Zalinoff* v. *Hammond* [1898] 2 Ch. 92.

(3) *The "Assunta"* [1902] P. 150.

MOTION.

Shelley Yap for the plaintiffs.

Stephen Foo for the defendant.

Lee Hun Hoe J.: This is a motion to set aside the writ of summons and the service of the same for irregularity on three grounds, namely,

"(1) that under the Government Proceedings Ordinance, 1956 the defendant has been wrongly sued by the plaintiffs,

(2) that the service of the said writ of summons does not comply with Order 1A rule 1(3) of the Rules of Supreme Court, 1957 in that a writ of summons instead of a notice thereof was served on the defendant;

(3) that the service of the said writ of summons does not comply with section 26 of the Government Proceedings Ordinance, 1956 in that the Conservator of Forests instead of the State Attorney-General was served."

The plaintiffs are timber merchants. They sued the Conservator of Forests for $6,588 which they claimed to have paid as royalty under a mistake of law or fact. It appears that the matter arose out of a criminal case whereby the plaintiffs agreed to pay the defendant compensation of $24,888 for the release of 139 pieces of logs measuring 14,640 cubic feet which had been detained. It further appears that the court refused to approve the arrangement made by the parties and instead ordered the logs to be confiscated and the plaintiffs to pay the compensation of $24,888 to the defendant which sum included royalty of $6,588 calculated at 45 cents per cubic foot on 14,640 cubic feet.

The Government Proceedings Ordinance, 1956 was extended to Sabah by the Modification of Laws (Government Proceedings and Public Authorities Protection) (Extension and Modification) Order 1965 (L.N.67 of 1965) made under section 74 of the Malaysia Act, 1963.

Section 22 of the said Ordinance reads: —

"(1) Civil proceedings by or against the Government of a State shall be instituted by or against the Government of such State.

(2) Where any civil proceedings against the Government of a State are instituted, an application may at any stage of the proceedings be made to the court by or on behalf of the Legal Adviser of such State to have the Federal Government or the Government of such other State as may be specified in the application substituted for or joined with the Government of such State as defendant to the proceedings."

It is not in dispute that royalty on timber is State revenue. By section 4(b) any claim arising out of revenue laws shall be enforceable by proceedings against the Government for that purpose. The Conservator of Forest is merely a public officer and as long as he performs his duty according to law he is deemed to be an agent of the Government. The proper person to sue is therefore the State Government.

The next ground relates to O.1A r.1(3) which reads: —

"No writ of summons shall be served upon any Government, or upon any person as representing a Government, but in any case where an action would ordinarily be commenced by writ, a writ may be issued and notice thereof in Form 1 may be served in lieu of service of the writ."

The plaintiffs had served the defendant with the writ itself instead of a notice of the writ. I think once the State Government is made a party the above provision must be complied with otherwise the service will be bad.

Lastly, it was submitted that the service should be affected on the State Attorney-General instead of the Conservator of Forests. This is so if it is an action against the State Government. Section 26 of the said Ordinance provides: —

"Without prejudice to the provisions of section 24 and section 25, all documents required to be served on the Government for the purpose of or in connection with any civil proceedings by or against the Government may be served, in the case of proceedings by or against the Federal Government, on the Attorney-General or such other officer as may be designated in that behalf, either generally or specially, by the Attorney-General by notification in the *Gazette*, and, in the case of

proceedings by or against the Government of a State, on the State Secretary of such State."

For East Malaysia the "State Attorney-General" is substituted for "State Secretary of such State." The claim is clearly for the refund of royalty paid on timber. It is a claim against State revenue and as such the State Government is involved.

The plaintiffs contended that there was no irregularity in suing the Conservator of Forests as the money was paid as a result of a demand by him. Even if there is any irregularity the court has a discretion to allow the plaintiffs to amend the writ. It was submitted that the defendant had taken fresh step by writing two letters to the plaintiffs. The defendant entered conditional appearance on 21st October, 1969. The first letter written before the conditional appearance asked for names and addresses of those constituting the firm. The second letter written after the conditional appearance asked for various particulars. The defendant had agreed to give the plaintiffs two weeks to file the necessary particulars.

O.70, r.2 reads: —

"No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

On the other hand the defendant contended that the steps taken did not amount to "any fresh step". The filing of an affidavit in answer to interrogatories is not taking a fresh step: *Wood* v. *Middleton*[1]. Nor the filing of an affidavit in answer to those in support of a motion for receiver: *Zalinoff* v. *Hammond*[2]. But an application for security for costs is a fresh step: *The "Assunta"*[3]. In my view the defendant is right to say that the two letters do not amount to "any fresh step".

From the statement of claim it seems that the compensation of $24,888 was ordered to be paid by the court. The proper course would be to appeal against the order. It is wrong to get round the difficulty by coming to this court. But there is nothing to prevent the Government agreeing to the payment *ex-gratia* if it is considered that the royalty should not have been included in the compensation.

I consider that the defendant is entitled to succeed in this motion to have the writ of summons and service of the same set aside with costs to be taxed.

Order accordingly.

TUA KIN LING v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Othman J.) February 4, 1970]

[Johore Bahru — Criminal Appeal No. 104 of 1968]

Evidence — Witness — Lying on one or two points — Whether whole evidence should be rejected — Duty of court.

Gaming — Assisting in carrying on a public lottery — Possession — Evidence of — Common Gaming Houses Ordinance, 1953, s. 4(1)(c).

The rule is that if a witness had lied on one or two points it does not necessarily follow that his whole evidence should be rejected. But it is the duty of the court to sieve the evidence and to ascertain what are the parts of the evidence tending to incriminate the accused which could be accepted.

In this case the appellant and another person were charged with an offence of assisting in carrying on a public lottery punishable under section 4(1)(c) of the Common Gaming Houses Ordinance, 1953. They claimed trial. At the end of the prosecution case the other person was acquitted and the appellant was called on to enter upon his defence. The learned magistrate accepted the evidence of a prosecution witness wholesale without rejecting the parts which had been shown to be inconsistent with the truth.

Held, allowing the appeal: the case for the prosecution as it stood in view of the conflicting testimony of the prosecution witness was no better than that against the acquitted man.

Cases referred to:-

(1) *Chan Pean Leon* v. *Public Prosecutor* [1956] M.L.J. 237.

(2) *Khoon Chye Hin* v. *Public Prosecutor* [1961] M.L.J. 105.

MAGISTRATE'S CRIMINAL APPEAL.

R. Ramason for the appellant.

Mohamed Nor bin Ahmad (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Syed Othman J.: The appellant and another person were charged with an offence of assisting in carrying on a public lottery punishable under section 4(1)(c) of the Common Gaming Houses Ordinance, 1953 (No. 26 of 1953).

They claimed trial. At the end of the prosecution case the other person was acquitted and the appellant was called on to enter upon his defence. At the conclusion of the hearing he was convicted and sentenced to pay a fine of $2,000 in default five months imprisonment.

The appeal is on many grounds mainly on questions of fact.

The prosecution case mainly relied on the evidence of the chief inspector, P.W.1. His evidence may be put briefly as follows: On 3rd April, 1968 at about 8.10 p.m. he led a police party to raid premises No. 1, Jalan Rogayah, Batu Pahat. Two officers entered the premises by the side door covering the ground floor, the first floor and the kitchen of the premises. P.W.1 himself with two other men went to the front portion of the premises which had a collapsible gate locked from inside. P.W.1 noticed a fat man seated beside a table. He was the appellant. P.W.1 identified himself and asked him to open the gates. But the appellant did not heed him. He collected pieces of paper in bundles from the drawer of the table and packed them in a paper bag, switched off the lights and disappeared in the dark. On seeing this P.W.1 went to the rear portion of the shop and warned his men at the rear to be on the lookout. P.W.1 went back to the front and got himself a piece of wood and forced open the collapsible gate. He entered the premises and flashed his torchlight and saw two male Chinese, the appellant and the other person coming from the rear of the shop. P.W.1